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No. 88-1605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID G. LUPO AND JAMES STEMMLER,
Petitioners,

vs.

R. ROWLAND & CO., *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners are two St. Louis lawyers who seek to overturn a decision by the Eighth Circuit affirming imposition of sanctions on them of $50,000 under both Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. Those sanctions were imposed because petitioners filed and maintained a frivolous securities fraud and RICO lawsuit against 32 defendants, which for nearly four years they conducted in an abusive manner so as to cause defendants to incur defense costs of over $1 million. Their former clients, the plaintiffs in the underlying securities and RICO litigation who obtained new counsel for the sanctions phase of this litigation, were similarly sanctioned $50,000, but accepted that decision and did not appeal it.

This matter presents issues of importance only to the parties and does not properly frame the questions supposedly presented by the Petition. The decisions below were fact-specific and

limited by their express terms to the particular conduct of these petitioners. Indeed, the Court of Appeals' decision on sanctions specifically stated that it was not establishing a general rule or practice for application of Rule 11 in the Eighth Circuit, and specifically held that sanctions were being allowed alternatively under Rule 11 and Section 1927. It is only by egregious misstatement and mischaracterization of the record that petitioners strive to create the impression that this case presents issues of constitutional dimension, on which the Circuits are allegedly split, and that these questions are worthy of review by this Court.

No such questions are presented. Indeed, no constitutional question of due process was ever presented and litigated below. Rather, in opposing the imposition of sanctions below, petitioners relied almost solely on narrow procedural issues, such as the date on which judgment in the case was entered, and whether the district court's findings of fact in respect to the sanctions were sufficiently detailed.

At no time — then or now — have petitioners offered any coherent explanation of how they discharged their Rule 11 and Section 1927 obligations to conduct sufficient pre-filing inquiry to satisfy themselves that the claims in their original and amended complaints had merit, and then to litigate the case in a professional and appropriate manner. The reason for petitioners' silence is not that they were unaware of the charges against them. Both the absence of any merit to their 10b-5 and RICO complaint, and their irresponsible handling of the case, were highlighted in respondents' joint application for sanctions, the several decisions of the district court, and the two decisions on the merits rendered by the Court of Appeals. Rather, petitioners are unable to explain or defend their conduct of this matter because that conduct was indefensible and richly merited the modest sanctions imposed.

This case presents no issue worthy of plenary review by this Court. Its tangled record does not present questions of con-

stitutional dimension; few if any of the plethora of Rule 11 issues argued by petitioners as justifying resolution by this Court were even preserved below; and inasmuch as the case was affirmed below on the independent basis of Section 1927, decision by this Court on the Rule 11 issues presented would be little more than an advisory opinion that would have no effect whatsoever on the judgment below. For all these reasons, this case would be an inappropriate vehicle for one of this Court's first and authoritative decisions construing Rule 11 and establishing broadbased rules and procedures for use of the Rule throughout the Circuits.

The Petition for Certiorari should be denied.

STATEMENT OF THE CASE

The district court aptly described the procedural history of this case as "tortured" (A.23).[1] Since it was filed in June 1982, this case has been before the Eighth Circuit no fewer than eight times, including: two separate unsuccessful mandamus proceedings brought by petitioners protesting the handling of discovery (Nos. 83-2532 and 84-1270); three unsuccessful applications by petitioners to the Court of Appeals for extraordinary relief to challenge the setting of the case for trial (variously styled as an appeal, mandamus and prohibition, Nos. 86-1009, 86-1016 and 86-1032); yet another unsuccessful mandamus application by petitioners seeking review of the district court's refusal to permit them to withdraw as counsel on the eve of trial (No. 86-1096); a full-scale and equally unsuccessful appeal on the merits of the district court's pre-trial and summary judgment rulings (*Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554 (E.D. Mo. 1986) (A.18), *aff'd*, 815 F.2d 713 (8th Cir.), *cert. denied*, 108 S. Ct. 160 (1987) ("Bastien I")); and finally an

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[1] "A. " refers to the appendix to Petitioner's Petition for Certiorari; "App. " refers to the appendix filed with the Court of Appeals.

unsuccessful appeal from the district court's imposition of sanctions which prompts this current Petition for Certiorari (*Bastien v. R. Rowland & Co.*, 116 F.R.D. 619 (E.D. Mo. 1987) (A. 70), *aff'd*, 857 F.2d 482 (8th Cir. 1988) ("Bastien II")).

Both the extraordinary attention this case has extracted from the Court of Appeals, and the complete absence of merit in any of petitioners' various appeals and applications for extraordinary relief from that court, mirror the conduct of this litigation by petitioners in the district court. The more than 600 district court docket entries reflect motions, pleadings and other practices by petitioners which imposed exceptional burdens on both the parties and the trial court, in a cause that had no prospects of success from its inception and was handled in an abusive fashion.

A comprehensive review of the several dozen different opinions and orders of the several district judges, the two U.S. magistrates, the special master, and the several panels of the Court of Appeals which decided these countless disputes would leave little doubt about the views of these many different judges as to which parties were responsible for the breakdown of the judicial machinery in this matter. Certainly Judge Gunn, who had the most intimate familiarity with the facts and circumstances of this case,[2] had no doubt about the identity of the

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[2] From the time the case was assigned to Judge Gunn upon his taking the federal bench in the summer of 1985 (after a distinguished career in the state judiciary), he considered more than 50 motions filed by petitioners (virtually all of which were denied as frivolous); he convened no fewer than four pre-trial conferences; he considered voluminous summary judgment motions and supporting pleadings; he reviewed full pre-trial sumissions; he presided over four days of trial; he heard lengthy oral argument on summary judgment; he reviewed detailed applications for sanctions and supporting briefs and affidavits; he twice convened hearings on the issue of sanctions — once to hear oral argument, and then a full day's evidentiary hearing. He and the magistrate assisting him altogether issued more than 40 different orders and memorandum decisions in the case.

offending parties or the extent of their transgressions. It is not happenstance that petitioners can cite no prior opinion during the past seven years of this litigation that upholds either the merits of the underlying action or their handling of it. Their misconduct is truly a matter of record.

This action was filed in June 1982 as a purported securities fraud case, brought under Section 10b of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j, alleging that a host of attorneys, accountants, brokers, promoters, etc., were engaged in fraud in connection with the sale in 1975 and 1976 of interests in motion picture limited partnerships.[3] Plaintiffs were eight wealthy and sophisticated investors who purchased their interests in these partnerships as tax shelters, but who lost the tax benefits from their investments when the 1976 Tax Reform Act

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[3] The amended complaint was signed by petitioner Lupo, on behalf of the firm of Lupo & Stemmler. The two petitioners were the only partners in this firm, and both worked on a regular basis in the litigation virtually from its inception. Both regularly signed pleadings filed in connection with the case. Petitioners were jointly represented throughout the sanctions phase of this case, and did not raise any question as to their mutual responsibility for the handling of the matter until, after the Eighth Circuit's decision in *Bastien II*, when petitioner Stemmler obtained separate counsel and by a Motion for Reconsideration and for Rehearing En Banc, questioned whether he could be held liable for any pleadings signed only by petitioner Lupo. Of course by then it was too late for Mr. Stemmler to raise this issue and it was not considered by the Court of Appeals. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Kriegesmann v. Barry-Wehmiller Co.*, 739 F.2d 357, 358 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Holley v. Seminole County School Dist.*, 763 F.2d 399 (11th Cir. 1985).

retroactively changed the rules governing deductibility of investments of this type.[4]

Included among the defendants was virtually everyone with any involvement in the organization and sale of the various limited partnerships — and a large number of parties who had no involvement whatever (such as an accounting firm whose only involvement was the after-the-fact preparation of partnership tax returns, and the chairman of the brokerage firm which sold partnership interests whose only involvement was that he purchased a partnership unit personally).

The complaint contained a litany of allegations of fraud: that there were conspiracies between different organizers of partnerships, that films were purchased for the partnerships as part of sham transactions, that appraisals obtained by the partnerships were hoaxes, that the partnerships never did business, and that the offering prospectuses contained false representations on these and other subjects.

To circumvent a series of limitations on discovery imposed by a U.S. magistrate and the district court, petitioners filed an amended complaint in February 1984 which repeated all of the initial allegations in the complaint but added charges under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, that the sales of these motion picture partnerships were part of a pattern of racketeering by the various defendants.

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[4] At the time the partnerships were sold, an investor could deduct three to four dollars for every dollar actually invested. A principal purpose of the 1976 Reform Act was to limit the amount an investor could deduct on investments of this type to the amount actually invested. This change in the law was not unanticipated, and each offering prospectus made detailed and boldface disclosure that proposals to change the law were pending and "IF ENACTED INTO LAW IN THE FOREGOING FORM WOULD SUBSTANTIALLY ELIMINATE INCOME TAX ADVANTAGES WHICH INVESTORS MIGHT OTHERWISE EXPECT TO RECEIVE ..." (A. 20) The damages plaintiffs sought to recover in this case were essentially the tax deductions they lost due to the change in the law.

Defendants maintained their complete innocence from the inception of the case and categorically denied every allegation of fraud contained in petitioners' complaints. When defendants sought summary judgment shortly after the matter was first filed on the ground the case was time-barred, plaintiffs pleaded fraudulent concealment and survived that motion. Defendants sought to limit discovery to the specific movie partnerships which plaintiffs actually purchased rather than the dozens of other partnerships, as to which plaintiffs sought discovery, which seemed to have no conceivable relevance to the case. Defendants also sought a trial setting to put plaintiffs' allegations to their proof.

The sixth time the matter was set for trial, trial was actually begun.[5] The circumstances were somewhat unusual. The district judge stated on the morning of trial his concern that the case was wholly without merit. He gave leave to defendants to renew their motions for summary judgment and gave plaintiffs up to one week of trial to demonstrate the existence of some issue worthy of the full two-month trial they forecast would be required. (App. 150)

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[5] The sixth trial setting established in Judge Gunn's pre-trial order entered September 3, 1985, called for trial to begin on March 14, 1986. Petitioners immediately began filing a series of motions, in October, November and December 1985, seeking a delay of trial. When advised in late December 1985 that trial would not be delayed, petitioner Lupo suffered some form of collapse (the precise medical nature of which was never established), and his partner James Stemmler was required to continue litigation of the case. At a conference with the district court on December 31, 1985, it was revealed that petitioners had been actively seeking alternative trial counsel for more than three months, but had been unable to find anyone willing to take on the case.

Stemmler was no stranger to the case. He had been shown on various pleadings dating back more than eighteen months; he had been active in discovery; he had appeared at several hearings before Magistrate Noce. While he signed most pleadings filed after the date of Lupo's alleged incapacity, it was acknowledged on numerous occasions that Lupo continued to make all strategic decisions concerning

During the two and one-half days of trial testimony, plaintiffs failed to establish the existence of any issue worthy of trial. Their only witness was a New York lawyer named as a defendant whose firm prepared the offering prospectuses. He testified (as he had at deposition) that his firm had practiced securities law, with a special emphasis for more than fifty years on the preparation of offering materials; he testified that to his and his partners' knowledge, the offering materials were truthful and in full compliance with the federal securities laws. Upon learning that the next witness would be the chairman of the brokerage firm which sold interests to the plaintiffs (who had also purchased an interest himself, but who had had no dealings whatever with the plaintiffs), the district court adjourned trial and gave plaintiffs' and their counsel an additional eleven days to respond in writing to the pending motions for summary judgment. (App. 183-85)

Their response contained not one fact supportive of any of their claims. Indeed, the *only* affidavit they submitted was of an individual who claimed to have knowledge about the dealings of a motion picture partnership in which none of the plaintiffs had invested. (A. 27-28) These opposition papers were equally barren of any proof of "fraudulent concealment" of plaintiffs' claims that would justify tolling the statute of limitations.

Judge Gunn so found in his ultimate grant of summary judgment:

> It is the judgment of this Court that plaintiffs have failed to meet the burden placed upon them by defendants' motions. After hearing plaintiffs' evidence at trial and reviewing the documents submitted in opposition to defen-

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the case. It was not until a motion for rehearing was filed with the Court of Appeals that Stemmler ever suggested that it was necessary or appropriate to distinguish between his and Lupo's responsibility for the filing of various pleadings.

> dants' motions, *the Court concludes that plaintiffs are without evidence to support any of the factual allegations of their complaint, and that a two-month trial would involve the parties and the Court in needless — if not abusive — delay and expense.*
>
> . . . .
>
> Judge Meredith in 1983 declined to dismiss plaintiffs' complaint solely on the ground that plaintiffs had pleaded fraudulent concealment. Three years later *plaintiffs are without anything to support that pleading.* Without proof of such concealment, all of plaintiffs claims are barred by the statute of limitations. (A. 27-29) (emphasis supplied)

Summary judgment was thereafter granted. The Eighth Circuit affirmed and certiorari was denied by this Court. *Bastien v. R. Rowland & Co.*, 631 F. Supp. 1554 (E.D. Mo. 1986) (A. 18), *aff'd,* 815 F.2d 713 (8th Cir.), *cert. denied,* 108 S. Ct. 160 (1987).

The district court then took up the application for sanctions, which had been filed shortly after summary judgment was entered,[6] and by which all defendants sought to recover their costs of defense from plaintiffs and their counsel. Affidavits submitted by the various defense counsel established that the

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[6] At oral argument on the pending motions for summary judgment on March 31, 1986, Judge Gunn announced his decision to grant summary judgment from the bench. His courtroom clerk prepared a docket entry which read in part, "Court grants motions for summary judgment....Order to be entered forthwith." (Add. 14). It was not served on any of the parties. No separate document reflecting a judgment was ever prepared. On April 17, 1986, Judge Gunn issued a written opinion which stated "It is hereby ordered that the motions of defendants be and are granted." Respondents' Joint Application for Sanctions was filed 20 days after entry of this Order, within the 21 days provided under Local Rule 30 of the U.S. District Court for the Eastern District of Missouri for applications for attorneys' fees.

total costs of defense — up to the time summary judgment had been granted — was more than $1 million.[7]

The joint application for sanctions (A. 32) identified three separate grounds on which sanctions should be awarded: Rule 11 of the Federal Rules of Civil Procedure; 28 U.S.C. § 1927; and the bad faith exception to the American Rule on awards of attorneys' fees. Respondents' joint application for sanctions identified numerous incidents of misconduct and improper practices employed by petitioners during the litigation — including the filing of a frivolous and unfounded amended RICO complaint; the filing of numerous frivolous and unfounded motions; the abusive handling of discovery; and the refusal to comply with the district court's rules of practice.

The district court directed plaintiffs (by now represented by new counsel) and petitioners to respond to this motion for sanctions. After submission of briefs and affidavits, the court held oral argument at which counsel were invited to give their views on the appropriate procedures to follow in considering the pending application. Attorneys for the plaintiffs affirmatively requested the right to present evidence, and the district court later convened an evidentiary hearing for this purpose. Petitioners, who now were also represented by counsel, did *not* request the right to present evidence but stated their election to proceed by submission of affidavits and legal memoranda. At no time during proceedings before the district court did petitioners com-

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[7] These affidavits did not address the substantial additional expense defendants have incurred in the satellite litigation required to establish the propriety of sanctions in this case — which include preparation of several briefs submitted to the district court, the conduct of both oral argument and evidentiary proceedings before the district court, the handling of a full appeal to the Eighth Circuit, and the preparation of this brief. The $50,000 sanction would now do little more than compensate defendants for their expenses in litigating their entitlement to it. The costs of plenary proceedings in this Court, added to these prior costs, would substantially exceed the sanction initially imposed.

plain that they lacked notice of the charges against them, or that they were unable to respond to the pending application for sanctions.

The district court decided to grant a limited sanction, in the amount of $100,000 — one half to be paid by plaintiffs and one half by petitioners. *Bastien v. R. Rowland & Co.*, 116 F.R.D. 619 (E.D. Mo. 1987) (A. 70), *aff'd*, 857 F.2d 482 (8th Cir. 1988).[8] In his sanctions opinion, Judge Gunn specifically stated that inasmuch as his award "represents a fraction of the fees and costs incurred by defendants in this suit" he declined to "engage in a determination of the reasonableness of particular fees and costs charged to its defense." (A. 72-73) His opinion contains a specific finding that petitioners engaged in "bad faith conduct." (A. 73) The district court's sanctions opinion did not attempt to catalog all of the specific episodes of misconduct of which petitioners were guilty but stated:

> This Court set forth an extensive procedural history of the case in its order granting summary judgment on April 17, 1986. A cursory review of the twenty-four volume case file provides ample illustration of the manner in which this litigation was conducted. The Court will not, therefore, repeat the tangled narrative. (A. 71)

On appeal, petitioners advanced a number of different theories and assertions in challenging the propriety of sanctions against them, but no constitutional issue of due process was included in this list of issues to be considered on appeal,[9] although

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[8] The overall reasonableness of this sanction was not questioned. Petitioners themselves admitted that they charged their clients some $197,000 for work done prior to trial — despite the fact they were on a partial contingent fee arrangement and did not bill for the entirety of the time spent on the matter. (App. 223) No one doubted that the 32 defendants, represented by some nine different law firms, incurred substantially greater costs in defending the action.

[9] The issues presented to the Eighth Circuit are listed at A. 1-2.

there was a passing mention of this issue (at page 38 of their opening brief).

The Eighth Circuit affirmed in all respects. With regard to the specific issue as to whether a district court order granting sanctions should identify with precision each pleading as to which a Rule 11 sanction was being granted, the Court said:

> Although we prefer that courts identify specific pleadings and other documents when imposing Rule 11 sanctions, we find that the district court had adequate support for proceeding as it did and that Lupo and Stemmler had fair notice of the basis for the court's ruling. (A. 80-81)

After summarizing what it agreed was the "tortured" history of the case, the Court of Appeals concluded:

> Our review of the facts reveals overwhelming support for the imposition of sanctions. The defendants as a whole spent over $1,000,000 defending this case. In fact, "[t]he costs of this prolonged litigation have far exceeded the amount of investment capital which is its subject matter." As such, we find that the $50,000 sanction was certainly well within the parameters of reasonability and that the district court did not abuse its discretion in imposing the sanctions. The amended petition adding the RICO count certainly meets the requirement of a pleading signed in violation of Rule 11. The claim was not "well-grounded in fact" or "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." (A. 81) (citation omitted).

The Court of Appeals also specifically noted that the findings by the district court were sufficient to permit the imposition of sanctions under Section 1927, which the Court said "provides us with an alternative ground for affirmance." (A. 82)

REASONS THE WRIT SHOULD BE DENIED

Plenary proceedings in this Court would be inappropriate in this case. The findings and conclusions of the lower courts were entirely proper and in conformity with the overwhelming body of caselaw that has developed under both Rule 11 and Section 1927. The procedural posture of this matter, the issues preserved on appeal by petitioners, and the unusual factual background all make it a dubious vehicle for comprehensive review by this Court of Rule 11 practices and procedures.

I

PETITIONERS' MISCONDUCT WARRANTED THE IMPOSITION OF SANCTIONS

Petitioners do not challenge the ultimate propriety of sanctions against them, but only question the procedures followed below. None of their four Questions Presented dispute the underlying merits of an award of sanctions in this case.

The decision to impose sanctions was a correct one, a factor which strongly suggests that plenary review by this Court is unnecessary in this case. As a practical matter, the substantial deference to the fact-finding by the district court compels affirmance of its conclusions. This standard of review was correctly described by the Eighth Circuit in *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987):

> This determination that the plaintiffs' conduct was justified rests upon and is informed by the District Court's *intimate familiarity with the case, parties, and counsel, a familiarity we cannot have. Such a determination deserves substantial deference from a reviewing court.* (emphasis added).

Nothing would be gained, we submit, by having this Court delve into the tangled and protracted record to consider the merits of hundreds of pleadings and discovery disputes, and the

ultimate merits of the numerous securities, RICO and state law claims asserted by petitioners. The vast majority of these "issues" have already been resolved by the Court of Appeals in the appeal from summary judgment on the merits of plaintiffs' claims, and this Court denied certiorari on October 5, 1987 in No. 87-219.

The correctness of the decision to impose sanctions can scarcely be debated if Rule 11 and Section 1927 have any meaning whatever. Judge Gunn believed that "[a] cursory review of the twenty-four volume case file provides ample illustration of the manner in which this litigation was conducted." *Bastien II*, 116 F.R.D. at 621, n. 1. The Eighth Circuit conducted a thorough review of the record and concluded "[o]ur review of the facts reveals overwhelming support for this imposition of sanctions." (A. 81)

These decisions were entirely correct. Given the nature of the sanction being imposed (a small fraction of the total costs of defense), litigation over the propriety of specific defense costs to respond to *each* abusive pleading would have been both costly and unnecessary under Rule 11. Rule 11 calls for sanctions where individual pleadings, such as the amended complaint filed and signed by petitioners, are meritless. But Rule 11 also calls for sanctions where any pleadings, whether meritless on their face or not, are filed "to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11; *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1476 (9th Cir. 1988). Judge Gunn specifically found that the "bulk" of petitioners' filings were "frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action.' " (A. 72) He thus was not required under Rule 11 to seek out and make findings with respect to individual meritless pleadings.

In any event, the decisions below were completely consistent with other decisions which considered the entire costs of defense

when the underlying action was found to be frivolous and commenced in contravention of Rule 11. *See, e.g., Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 83 (1987) (sanction of over $294,000 against attorney for all costs of defense); 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 11.05 (1987) (and cases cited therein).

II

NO DUE PROCESS OR RULE 11 PROCEDURAL ISSUES ARE PROPERLY PRESENTED BY THIS CASE

Questions I and III which petitioners ask this Court to consider pertain to procedural due process. Question I asserts that petitioners were not given fair notice of the charges against them and, inferentially, that they did not have a fair opportunity to respond. Question III appears to assert that there was some defect in the district court's decision to convene an evidentiary proceeding because of an alleged lack of notice that sanctions were being sought against petitioners.

Neither issue has merit, and neither was properly presented below in such a fashion as to preserve it for review by this Court.

The procedures followed in imposing sanctions were scrupulously fair. Recognizing that the law was unclear as to the scope of the proceedings required to be conducted before sanctions of this type could be ordered, Judge Gunn solicited the views of the parties as to how best to proceed — and when asked by petitioners' clients to convene an evidentiary proceeding, he did so. Petitioners did *not* make any such request, although their counsel was permitted to participate in the evidentiary proceeding as he saw fit (see App. 243-302). No motion was made that the joint application for sanctions was impermissibly vague, or that petitioners were ignorant of the charges against them.

Indeed, petitioners were sufficiently informed of the charges against them that they were able to file three different legal memoranda and three affidavits attempting to respond to those charges. Nothing in these filings suggested that petitioners believed they had been deprived of fair notice and the opportunity to be heard before sanctions were imposed. For example, on May 19, 1986, petitioners filed a detailed "Motion to Strike" directed to the joint application, asserting that the application was filed out of time. (App. 195)[10] On May 14, 1987, peti-

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[10] Petitioners advanced in this filing the theories they have maintained in the Eighth Circuit as their principal ground for reversal of the sanctions, namely that the application for sanctions should be regarded as a motion to alter or amend judgment, and thus governed by the 10-day limit contained in F. R. Civ. P. 59(e), or that "judgment" had been entered orally by the district court on March 31, 1986 and thus the joint application was not filed within the 21-day limit contained in local Rule 30 of the Eastern District of Missouri. Their Rule 59(e) "issue" was foreclosed by this Court's decision in *White v. New Hampshire Dep't. of Emp. Sec.*, 455 U.S. 445 (1982), which now has been often applied to hold that applications for sanctions are not governed by Rule 59(e). *See Obin v. District No. 9, Int'l Ass'n of Machinists*, 651 F.2d 574 (8th Cir. 1981); *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983); *Hicks v. Southern Md. Health Sys. Agency*, 805 F.2d 1165 (4th Cir. 1986); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 99 F.R.D. 576, 577-78 (N.D. Ga. 1983); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 48 (2d Cir. 1982); and *Krushinski v. Roadway Express, Inc.*, 110 F.R.D. 11, 14 (M.D. Pa. 1985).

Petitioners' claim that the oral statements of the trial court, memorialized in a docket entry, constitute the "judgment" in this matter (see Issue IV of Questions Presented), is no less unsound. It is contrary to *United States v. Indrelunas*, 411 U.S. 216 (1973), and its progeny, most notably *Wood v. Coast Frame Supply, Inc.*, 779 F.2d 1441, 1442 (9th Cir. 1986); *Pure Oil Co. v. Boyne*, 370 F.2d 121, 122 (5th Cir. 1966); *C.I.T. Fin. Servs. v. Yeomans*, 710 F.2d 416, 417 (7th Cir. 1983); *Superior Life Ins. Co. v. United States*, 462 F.2d 945, 947-48 (4th Cir. 1972); *Levin v. Wear-Ever Aluminum, Inc.*, 427 F.2d 847, 848 (3rd Cir. 1970), *aff'd*, 442 F.2d 1307 (3d Cir. 1971); *United States v. Evans*, 365 F.2d 95, 97 (10th Cir. 1966); *see also Ellender v. Schweiker*, 781 F.2d 314, 316 (2d Cir. 1986). This precise issue was considered and decided adversely to petitioners in *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977) (*aff'd* 583 F.2d 298 (7th Cir. 1978), and *Levin*, 427 F.2d at 48-49 (docket entry and informal memorandum by courtroom clerk did not constitute judgment under Rule 58).

tioners filed a 19-page reply responding to the numerous specific grounds for sanctions identified in the joint application. (App. 217) On May 29, 1987, petitioners filed yet another legal memorandum with the district court, making several additional arguments (none of which related to their current claim that they lacked notice of the grounds for the sanction being sought).[11]

Oral argument on the joint application was held on July 7, 1987. At that time, counsel for petitioners, when asked how he intended to proceed, joined with counsel for defendants in stating that he planned to argue based on the papers filed and

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[11] Indeed, in their May 29, 1987, filing, petitioners joined in earlier submissions filed by their former clients, one of which stated that "[i]t appears the defendants seek to impose sanctions based upon the very filing of this action," and argued that since the initial filing of the complaint pre-dated the October 1983 amendments to Rule 11, the old "objective" standard under former Rule 11 should apply. While this was a manifest misreading of the joint application, which referred to the "patently frivolous RICO count" filed after amendment to the rule, it makes it apparent that petitioners understood perfectly well that one of the grounds for sanctions was the filing of their amended RICO complaint in 1983.

The same memorandum also contended that because other specific provisions in the Federal Rules dealing with sanctions (such as Rules 26(g) and 37) may apply to certain of the pleadings referred to in the joint application, and because those specific provisions might take priority over Rule 11 sanctions, greater specificity in identifying the pleadings should be required. No assertion was otherwise made that the joint application was impermissably vague, and the argument made in this memorandum that Rules 26 and 37 might take priority over Rule 11 for purposes of sanctions is not among the Questions Presented in the Petition for Certiorari.

the record before the court. (App. 245)[12] Petitioners made no objection at this hearing that they were unable to respond because of some failure to specify the grounds on which sanctions were being sought.

The district court convened an evidentiary hearing on July 30. Petitioners did not seek to present evidence, although their counsel otherwise participated in the hearing. At no time did they assert that they lacked notice that sanctions were being sought against them personally. Indeed, their original pleading filed on May 19, 1986, described the pending application for sanctions as being "against Plaintiffs and their attorneys in this cause." (App. 195)[13]

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[12] Petitioners misleadingly quote from the transcript of this hearing in their Petition (pages 8-9), for a comment by a Mr. Leonard concerning "constitutional rights of due process." Petitioners fail to acknowledge that this attorney was not appearing on their behalf, but on behalf of their former clients -- and that his request for an evidentiary hearing was later granted by the District Court. Their own attorney at this hearing, Mr. Ebert, made no such request and raised no due process challenge to the manner in which the proceedings were being conducted. *See* transcript of argument, App. 245-301. Indeed, Mr. Ebert's only request was for permission to file counter-affidavits to respond to the affidavits filed the morning of the hearing by petitioners' clients (App. 300-01).

[13] To the extent petitioners' Question III purports to question whether petitioners had actual notice that sanctions were being sought against them, it is frivolous. The joint application stated that "defendants respectfully submit that it is proper to require plaintiffs *or their counsel* to pay all reasonable attorneys' fees and expenses incurred in this case." (A. 35) Indeed, that application invoked Section 1927 which is applicable *only* to attorneys. On May 27, 1987, certain of petitioners' clients filed a motion with the district court to compel petitioners' withdrawal from the case due to inherent conflict of interests between them in light of the pending joint application seeking sanctions against both petitioners and their clients. On June 11, 1987, petitioners filed an application to withdraw as counsel for plaintiffs in respect to the pending joint application, "because of the possible conflicts of interest between said attorneys and the Plaintiffs regard-

Petitioners made a conscious election to forego presenting evidence. They filed several affidavits in advance of the hearing (App. 304-48), and their only request during the hearing was for leave to have their affidavits considered by the court (App. 352-53). They raised none of the due process and notice issues before the district court that they now contend should be reviewed by this Court.

On appeal, petitioners did, for the first time, attack the fairness of the procedures followed by the district court, but their attack lacked focus. Their brief complained about virtually all aspects of the proceedings below, both in the underlying litigation as well as the sanctions phase — but as almost an afterthought (at page 38 of their opening brief), petitioners asserted that they lacked fair notice of the papers which were the basis for sanctions, and that this presented a due process concern. This assertion was lumped with several other assertions, such as an alleged right to trial by jury, and a claim that the sanction should be deemed to be in the nature of criminal contempt (Opening Br. 39).

Putting aside the serious question whether such an issue had been preserved due to the failure to raise it below, the Court of Appeals considered the question and correctly held: "Lupo and Stemmler had fair notice of the basis of the court's ruling." (A. 80-81)

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ing said Motion as raised initially by the undersigned and subsequently by other attorneys petitioning for Plaintiffs." Petitioners were thereafter separately represented by counsel, who participated in several district court proceedings on their behalf. They cannot seriously maintain that they were unaware that sanctions might be imposed against them personally.

III

NO ADDITIONAL DISTRICT COURT FINDINGS AND CONCLUSIONS WERE NECESSARY IN THE CIRCUMSTANCES OF THIS CASE

Petitioners' Question II raises the issue whether a court imposing Rule 11 sanctions is required to make specific findings of fact with respect to every pleading which is the subject of sanctions, and whether the decision below invites generalized and unfocused use of Rule 11 by district courts because it did not require such detailed findings in this case.

It is doubtful that this issue has been preserved for consideration by this Court. In their opening brief in the Court of Appeals, petitioners stated: "findings of fact and conclusions of law are recommended, although the rule does not expressly require them." (Opening Br. 39) Petitioners did not request detailed findings from the district court, and did not ask the court to reconsider its order and amplify its findings when the order imposing sanctions was issued.

Moreover, it is hardly true that the district court failed to articulate the reasons for its decision. The sanctions order expressly incorporated by reference a 13-page summary judgment opinion, which explained in detail the prior history of the case and the specific instances of misconduct by petitioners — both in their handling of the litigation and in their pursuing litigation for which they had no evidence whatsoever. The only complaint petitioners can have about these two opinions is that the district court did not attempt to assign specific defense costs to specific pleadings in arriving at the amount of the sanction. Given the nature of the sanction involved, and the grounds for it, there was no need for such specificity in this case. As we read the other Rule 11 cases cited by petitioners, we doubt that any greater specificity would have been required under the caselaw in any other Circuit.

In any event, the Eighth Circuit did not purport to establish any such rule or practice in its decision. To the contrary, it expressly stated "we prefer that courts identify specific pleadings or other documents when imposing Rule 11 sanctions . . ." (A. 80) It upheld the imposition of sanctions here only because of the unique and aggravated circumstances of the case. Nothing in the opinion below invites the type of abuse of Rule 11 suggested by petitioners.

IV

THIS CASE WAS DECIDED UNDER BOTH RULE 11 AND SECTION 1927 AND IT IS UNDISPUTED THAT SECTION 1927 OFFERS AN INDEPENDENT BASIS FOR IMPOSING SANCTIONS

Without regard to the merits of any of the Questions petitioners seek to raise in this Court, this is an inappropriate vehicle for plenary review by this Court of Rule 11 practices and procedures.

The decision below affirmed the imposition of sanctions on alternative grounds — both Rule 11 and Section 1927. While it is true that one prong of Rule 11 speaks in terms of specific pleadings as a basis for sanctions, Section 1927 does not. Sanctions under this alternative ground are generally authorized against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously . . . ." The district court found that "plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously," and determined that their conduct of the case "was frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of [the] action." (A. 72) The court concluded that a sanction was appropriate "for bad faith conduct on the part of plaintiffs and their counsel." (A. 73)

These findings were affirmed by the Eighth Circuit as an independent basis for imposition of sanctions under Section 1927.

(A.82) Nothing in the questions presented in the Petition for Certiorari contests the propriety of this holding, or raises any question about the applicability of Section 1927 to this case. Any ruling by this Court on the Rule 11 Questions Presented would thus have no effect on the judgment entered, and would be no more than an advisory opinion.

CONCLUSION

For all the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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